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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MARK R. TAYLOR,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether government agents at an immigration checkpoint within the United States violate an individual's fourth amendment right against unreasonable search and seizure by detaining the individual to investigate for drugs after immigration requirements are satisfied and where there is no reasonable suspicion any type of offense has or is taking place?

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MARK R. TAYLOR,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Mark R. Taylor, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on 29 May 1991.[1]

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[1] No other individual is a party to this petition.

OPINION BELOW

On 29 May 1991 the Court of Appeals entered its Opinion vacating the district court's order suppressing evidence used to charge the petitioner with conspiracy to possess a controlled substance with the intent to distribute and possessing a controlled substance with the intent to distribute, in violation of Title 21, United States Code, §§ 846 and 841(a)(1).

The Court of Appeals Opinion of 29 May 1991 is reported at 934 F.2d 218 and a copy is attached as Appendix "A." A copy of the court's denial of petitioner's petition for rehearing and suggestion for rehearing en banc is attached as Appendix "B".

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on 29 May 1991. The same court denied petitioner's petition for rehearing on 6

September 1991. Jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ."

STATEMENT OF THE CASE

On 28 April 1990, a vehicle driven by petitioner Mark R. Taylor was referred to secondary inspection by a U.S. Border Patrol agent at the permanent San Clemente immigration checkpoint. The checkpoint is located 66 land miles north of the Mexican border along Interstate 5. The agent referred the vehicle to secondary inspection because he thought Mr. Taylor was acting nervously and may have been

concealing illegal aliens or drugs. [R.T. 6/25 37-39].[2]

At secondary inspection, Agent Stuart Gary asked for and was given permission by petitioner to search the trunk of the vehicle. [R.T. 6/25 51]. Finding no evidence either of alien smuggling or contraband, Agent Gary determined he had completed his immigration inspection. [R.T. 6/25 54].

Mr. Taylor was detained further to await the arrival of a drug-detecting dog. [R.T. 6/25 56-58]. Approximately one minute later, Agent Gary ran the dog on the car. The dog alerted. [R.T. 6/25 60]. The parties stipulated in the trial court that the dog alert supplied probable cause to search the car further. [R.T. 6/25 5-6]. The agent's search revealed approximately

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[2] "R.T. 6/25" refers to the Reporter's Transcript of the 25 June 1990 suppression hearing.

two pounds of methamphetamine hidden beneath the back seat.

Mr. Taylor was indicted 9 May 1990 for conspiracy to possess a controlled substance with the intent to distribute and possessing a controlled substance with the intent to distribute, in violation of Title 21, United States Code, §§ 846 and 841(a)(1).

The district judge ruled at the suppression hearing that Mr. Taylor's fourth amendment rights had been violated because 1) the detention of Mr. Taylor beyond the time necessary to complete the immigration inspection was not supported by reasonable suspicion, and 2) the government had failed to present facts showing the effectiveness of using an immigration checkpoint as a drug checkpoint outweighed the intrusiveness of the stop. [R.T. 7/2 38-39].

The government timely appealed. The Ninth Circuit Court of Appeals has jurisdiction over interlocutory appeals from suppression orders of the District Court for the Southern District of California under Title 18, United States Code, § 3731 and Title 28, United States Code, §§ 41, 84, and 1294(1).

The petitioner contended on appeal that absent reasonable suspicion, the Border Patrol agents violated his right against unreasonable search and seizure by detaining him to investigate for drugs. The government argued the further detention was reasonable under the Fourth Amendment because of the drug interdiction purposes served by the San Clemente immigration checkpoint.

A three-judge panel of the Ninth Circuit Court of Appeals vacated the suppression order and remanded the case for

trial. The panel held the brief further detention of petitioner for purposes of a canine sniff was reasonable because it was justified by minimal or articulable suspicion based solely on Mr. Taylor's apparent nervousness. [Appendix "A" at 6658-59.]

REASONS FOR GRANTING THE WRIT

1. The decision of the court below departs unconstitutionally from this Court's decisions in *Martinez-Fuerte*, *Terry v. Ohio* and *Brown v. Texas* by authorizing detention for drug investigation at a permanent immigration checkpoint without a showing of reasonable suspicion.

In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court held that a brief, suspicionless stop at a permanent Border Patrol checkpoint is consistent with the fourth amendment where such a stop is limited to a routine inquiry into immigration status. Id. at 558-560. The holding in Martinez-Fuerte permits a suspicionless checkpoint detention only

where an individual is detained for a reason consistent with the underlying purpose of the checkpoint. See Michigan Dept. of State Police v. Sitz, ___ U.S. ___, 110 S.Ct. 2481, 2485 (1990).

The checkpoint "seizure"[3] endorsed below was beyond the scope of the immigration stop permitted by Martinez-Fuerte and therefore was subject to the requirements of Terry v. Ohio, 392 U.S. 1 (1968). In Terry, the Court held a brief detention for investigative purposes must be justified by reasonable suspicion supported by articulable facts. There was no evidence before the court below that the Border Patrol agent had anything "more substantial than inarticulate hunches[,]"

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[3] A checkpoint stop is a "seizure within the meaning of the Fourth Amendment." United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976).

Terry, 392 U.S. at 22, to support detaining Mr. Taylor for non-immigration reasons.

The Court ruled in Brown v. Texas, 443 U.S. 47 (1979), that the constitutionality of a seizure less intrusive than a traditional arrest must be determined by a three-prong test weighing "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." 443 U.S. at 50-51. A stop is permitted under Brown only where the circumstances "justif[y] a reasonable suspicion" the individual is involved in criminal conduct. Id. at 52.

The appellate panel below purported to hold Mr. Taylor's detention for a canine sniff constitutional under the Brown balancing test. [Appendix "A" at 6657.] The balancing test mandated by the Court in

Brown v. Texas, however, is directed not at determining whether a search might be justified by a lesser standard than reasonable suspicion, but whether a search and seizure was reasonable at all under the fourth amendment. 443 U.S. at 51. Brown requires a showing of specific, objective facts indicating that a seizure is compelled by the legitimate interests of society, in order to justify a seizure as based on reasonable or founded suspicion rather than probable cause. Id.

The court below relied improperly on Martinez-Fuerte and Brown v. Texas to expand an immigration stop to include an investigation for drugs. Reasonable or founded suspicion, not minimal or articulable suspicion, is required under Terry and Brown to support a checkpoint seizure for purposes other than an immigration inquiry.

2. The decision of the court below conflicts with recent decisions of the Fifth and Tenth Circuits finding detention at an immigration checkpoint for other than immigration purposes unjustified absent reasonable suspicion.

The Fifth Circuit Court of Appeals requires a showing of reasonable suspicion before detention of a driver at an immigration checkpoint for a non-immigration purpose may be found constitutional. United States v. Lanford, 838 F.2d 1351 (5th Cir. 1988). In Lanford, a driver was detained at secondary inspection after Border Patrol agents completed an immigration inquiry inspection because the agents believed the car driven by the suspect was stolen. 838 F.2d at 1352. Applying the standard of Terry v. Ohio, 392 U.S. 1 (1968), to Lanford's detention, the Fifth Circuit court emphasized that "the issue is whether, using an objective standard, the facts available to [the Border Patrol agent]

would give rise to a reasonable suspicion of criminal activity." Lanford, 838 F.2d at 1355.

The court below found Mr. Taylor's detention for non-immigration purposes lawful on a standard less than reasonable suspicion. The court's holding that a detention to search for contraband at an immigration checkpoint may be "predicated on an articulable suspicion or 'a minimal showing of suspicion,'" [Appendix "A" at 6658 (citations omitted)] is in direct conflict with the Fifth Circuit's standard of reasonable suspicion.

Ruling on facts nearly identical to the case at bar, the Tenth Circuit Court of Appeals held further detention for a dog sniff was not unreasonable only where the dog alerted before the underlying lawful purpose of the checkpoint stop - a check for vehicle registration - was completed.

United States v. Morales-Zamora, 914 F.2d 200, 203 (10th Cir. 1990). The holding in Morales-Zamora turned expressly on the timing of events at the roadblock:

> Because the defendants' vehicles were not detained beyond the measure of time required for the officer to complete his examination of the defendants' documents, the purpose for which we assume the defendants were lawfully detained, we hold that there was not a "seizure" of the defendants' vehicles for purposes of facilitating the canine sniff. 914 F.2d at 203.

Since the vehicle already was lawfully detained for a yet-to-be-completed vehicle registration check, the Tenth Circuit held "individualized reasonable suspicion of drug-related activity" was not required before a dog sniff could be employed. Id.

It was undisputed below that the narcotics-detection dog was not brought out to Mr. Taylor's car until after the Border Patrol agent had completed his immigration inspection. [R.T. 6/25 60]. The underlying purpose for the checkpoint stop

had been exhausted before the government agents further detained Mr. Taylor to pursue their drug investigation. The appellate court nonetheless found the further detention lawful. [Appendix "A" at 6658.] The decision below thus conflicts directly with the Tenth Circuit's holding in Morales-Zamora.

The Tenth Circuit repeatedly has declined to find further detention for non-immigration purposes at a Border Patrol checkpoint justifiable on any standard less than reasonable suspicion. In United States v. Benitez, 899 F.2d 995, 997-98 (10th Cir. 1990), the Tenth Circuit emphasized that reasonable suspicion is necessary before a person may be detained for a purpose other than the brief immigration questioning authorized by this Court in United States v. Martinez-Fuerte, 428 U.S. 543 (1976). See also, United

States v. Rubio-Rivera, 917 F.2d 1271, 1276 (10th Cir. 1990)(reasonable suspicion not required for a referral to secondary inspection "[t]o the extent that the agent had not resolved all immigration concerns about the defendant and the vehicle"). The Tenth Circuit has found immigration checkpoint detentions for drug investigation "proper and lawful" only where the Border Patrol agent's inquiry "was based upon specific and articulable facts and rational inferences." United States v. Espinosa, 782 F.2d 888, 891 (10th Cir. 1986)(citing Terry v. Ohio, 392 U.S. 1 (1968); cf. United States v. Miranda-Enriquez, 941 F.2d 1081, 1083 (10th Cir. 1991)(Border Patrol investigatory stop must be justified by reasonable suspicion).

The court below found further detention for a drug inquiry at an immigration checkpoint justifiable by

minimal rather than reasonable suspicion.[4] [Appendix "A" at 6658.] This holding is directly contrary to Tenth Circuit decisions requiring the Border Patrol agent to have reasonable suspicion before detaining an individual for non-immigration purposes.

The lower court's decision subjects fourth amendment rights to casual invasion by immigration officers seeking contraband and is nothing less than an abrogation of the fundamental right against unwarranted governmental intrusion. See Almeida-

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[4] The lower court relied on border checkpoint cases for the minimal suspicion standard [see Appendix "A" at 6658] despite authority of this Court clearly distinguishing between the level of suspicion necessary to justify a non-immigration detention at an international border or its functional equivalent, and that applying to interior immigration checkpoints. United States v. Ramsey, 431 U.S. 606, 616-619 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Ortiz, 422 U.S. 891 (1975).

Sanchez v. United States, 413 U.S. 266 (1973). Whatever the temptation to help effectuate federal drug policies, the federal courts have a duty to uphold the fourth amendment and with it, the right of every individual to be free from governmental interference not based on probable cause or reasonable suspicion. See Boyd v. United States, 116 U.S. 616, 630 (1886); Weeks v. United States, 232 U.S. 383, 391-92 (1914).

CONCLUSION

For the foregoing reasons, petitioner respectfully submits the petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: 11-29-91

RICHARD M. BARNETT
Attorney for Petitioner
MARK R. TAYLOR

APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,	No.90-50438
v.	D.C. No. CR-90-0444-01-K
MARK R. TAYLOR, Defendant-Appellee.	**OPINION**

Appeal from the United States District Court for the Southern District of California
Judith N. Keep, District Judge, Presiding

Argued and Submitted
February 6, 1991-Pasadena, California

Filed May 29, 1991

Before: Alfred T. Goodwin, Proctor Hug, Jr.and Jerome Farris, Circuit Judges.

Opinion by Judge Goodwin

COUNSEL

Patrick O'Toole, Assistant United States Attorney, San Diego, California, for the plaintiff-appellant.

Kathryn A. Thickstun, San Diego, California, for the defendant-appellee.

William M. Walker, ACLU Foundation of the San Diego and Imperial Counties, San Diego, California, for amicus curiae.

OPINION

GOODWIN, Circuit Judge:

The government appeals the suppression of evidence discovered at a permanent U.S. Border Patrol checkpoint, extablished to detain motorists briefly for limited immigration-related inquiries. The district court held that a dual-purpose inspection by a U.S. Border Patrol agent, who had previously been cross-designated as an agent of the Drug Enforcement Agency ("DEA") and U.S. Customs, violated the fourth amendment. We reverse.

Mark R. Taylor, the driver of the

automobile, and two other passengers who are not parties to this appeal, were indicted on two counts: (1) conspiracy to possess about 880 grams of methamphetamine with the intent to distribute, and (2) possession of this controlled substance with the intent to distribute, in violation of 21 U.S.C. secs. 846 and 841(a)(1) (1988). The evidence leading to the indictment was found after the automobile was stopped by U.S. Border Patrol Agent Abel Aguilar at the permanent San Clemente checkpoint. The checkpoint is located 66 miles north of the Mexican border on Interstate 5, between San Diego and Los Angeles. The vehicle contained Taylor and two passengers.

Agent Aguilar, who was at the primary inspection point, referred the vehicle to the secondary inpection station because he thought the nervous behavior of occupants

could mean that they were concealing undocumented aliens or perhaps narcotics. At the secondary inspection station, Border Patrol Agent Stuart Gary, who was also cross-designated as an agent of the DEA and U.S. Customs, approached the driver's side of the vehicle and asked Taylor to stop his engine. After ascertaining that Taylor was a U.S. citizen, Agent Gary asked for permission to inspect the hatchback-trunk area of the vehicle. Taylor complied and opened the trunk. Agent Gary discovered no undocumanted aliens; nor did he find any drugs or contraband. At this point, Agent Gary's immigration inspection was completed. This portion of the detention at the secondary station lasted about three to four minutes.

Taylor became increasingly nervous and uneasy. Observing this, Agent Gary decided to use a "detector" dog trained to alert to

hidden persons or narcotics. He walked the dog around the outside of the vehicle, and the dog alerted positively. The detention for this portion of the inspection lasted approximately 60 seconds. The parties stipulated that Gary had probable cause to search the vehicle for narcotics after the trained dog had alerted. About 800 grams of methamphetamine, two handguns, money and drug paraphernalia were discovered in this search.

The sole issue on appeal is whether the brief continuation of this otherwise proper checkpoint detention for purposes of the canine sniff violated the fourth amendment. We hold that it did not.

A stop at a permanent U.S. Border Patrol checkpoint constitutes a "seizure" within the meaning of the fourth amendment. United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976). Such a stop is reasonable

per se, so long as the scope of the detention remains confined to a few brief questions, the possible production of a document indicating the detainee's lawful presence in the United States, and a "visual inspection of the vehicle ... limited to what can be seen without a search." Id. at 558, 562. The Supreme Court has cautioned, however, that "[t]he principal protection of the Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." Id. at 566-67. Thus, beyond limited intrusions, "checkpoint searches are constitutional only if justified by consent or probable cause to search." Id. at 567.

The parties do not dispute the propriety of the initial stop nor that referral to the secondary station was justified by the nervous behavior of the vehicle occupants. The heart of their

disagreement lies in the legality of the actions that took place after the trunk of the car had been searched and the immigraiton purposes of the stop had been served. Because of the intrusiveness inherent in extending the detention beyond the time required for immigration purposes, the government must present some justification for the brief additional delay. See id. at 557-58, 567.

Although Taylor had consented to the visual inspection of the interior of the luggage compartment, the record does not indicate any consent for the continued detention. Prior to the dog sniff, Agent Gary did not have probable cause to search. Thus, neither consent nor probable cause justified the continued detention. The government contends that a lesser justification than probable cause validates the brief continued detention for the dog

to walk around the car.

To delineate the sageguards the fourth amendment affords those stopped at a permanent U.S. Border Patrol checkpoint, public interests must be balanced against the interests of the individual. See id. at 555. Thus, to determine the standard that must be satisfied in order to justify the continued detention at issue, we "weigh[] ... the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Brown v. Texas, 443 U.S. 47, 50-51 (1979).

We need not recount the grave public concern with the flow of illicit narcotics into this country. Moreover, both common sense and the evidence proffered by the government support the conclusion that a very limited delay while a dog walks around

a lawfully stopped automobile would be useful in combatting Mexican border drug traffic.

We recognize that individual interests outrank government convenience in the fourth amendment balancing. In this case, however, the intrusion on individual interests was minimal. See Martinez-Fuerte, 428 U.S. at 557-58 (a routine checkpoint stop "intrudes to a limited extent on motorists' right to 'free passage without interruption' and arguably on their right to personal security")(citation omitted). The delay was brief - only a minute. It added an insignificant period of time to an otherwise indisputably lawful detention. Any personal intrusion attributed to the dog sniff was similarly minimal. See United States v. Place, 462 U.S. 696, 707 (1983)(holding that a canine sniff of luggage seized by narcotics

detectives at the airport is not a "search" within the meaning of the fourth amendment, principally because the personal intrusion posed by such an action is minimal). Such a "limited intrusion immediately detected the presence of contraband and would have revealed nothing about the container's contents had these been non-contraband." United States v. White, 766 F.2d 1328, 1331 n.3 (9th Cir. 1985).

In striking a proper balance under the fourth amendment between the public and private interests, we hold that the brief further detention conducted by the government in this case must be predicated on an articulable suspicion or "a minimal showing of suspicion," United States v. Couch, 688 F.2d 599, 604 (9th Cir.) cert. denied, 459 U.S. 857 (1982), of criminal activity. Cf. United States v. Des Jardins, 747 F.2d 499, 505-06 (9th Cir.

1984) (upholding a pat-down search of a person at the border based only on a minimal showing of suspicion).

In holding that the further detention in this case was unconstitutional, the district court relied on United States v. Hernandez-Alvarado, 891 F.2d 1414 (9th Cir. 1989). In that case, we held that U.S. Border Patrol agents lacked reasonable suspicion for an investigatory automobile stop. Id. at 1418-19. Hernandez-Alvarado is distiguishable, however, because it involved a roving stop-and-detention. Id. at 1415-16. Such a practice is intrinsically more intrusive than a checkpoint dog sniff after the vehicle has been lawfully stopped. See Delaware v. Prouse, 440 U.S. 648, 656 (1979); United States v. Ortiz, 422 U.S. 891, 894-95 (1975).

Although Agent Gary's suspicion would

not have sufficed to make a "roving" stop, see Hernandez-Alvarado, 891 F.2d at 1419 (stating that "defendant's alleged nervousness insufficient to create reasonable suspicion"), his observation that Taylor became increasingly nervous and uneasy at the end of the initial check for aliens consittuted minimal, articulable suspicion and therefore justified the brief further delay. The dog sniff itself did not exceed the boundaries of reasonableness. See, e.g., United States v. Moralez-Zamora, 914 F.2d 200, 205 (10th Cir. 1990) (finding nothing unreasonable in canine sniffs made of the exterior of vehicles in a public area where the passengers are not inconvenienced).

The suppression order is **VACATED** and the cause is **REMANDED** for trial.

APPENDIX "B"

(File-Stamped)
SEP-6 1991
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 90-50438
	)	
Plaintiff-Appellant,	)	D.C. No. CR-90-0444-01-K
v.	)	
	)	ORDER
MARK R. TAYLOR,	)	
	)	
Defendant-Appellee.	)	
	)	

BEFORE: GOODWIN, HUG and FARRIS,
Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Hug and Farris have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.

R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.